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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 160

ELY A. LANDAU,

Appellant,

v.

JOSEPH BEST, EVELYN BEST, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1132

ELY A. LANDAU,

Appellant,

v.

JOSEPH BEST, EVELYN BEST, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

MOTION TO DISMISS

Appellees in the above entitled case move to dismiss the appeal herein on the grounds that a substantial federal question is not present and the order appealed from lacks finality.

Statement of Case

This is a direct appeal from a decision and mandate of the Supreme Court of Delaware (App. A of Jurisdictional Statement) affirming the decision of the Chancery Court of the State of Delaware in and for New Castle County (App. A of Jurisdictional Statement) which denied a motion by appellant to vacate an order of sequestration

(App. D of Jurisdictional Statement) issued pursuant to Section 366 of Title 10 of the Delaware Code (App. B of Jurisdictional Statement).

The order appealed from arises out of two consolidated stockholders' derivative actions brought in the right and for the benefit of National Theatres & Television, Inc. (formerly National Theatres, Inc., now National General Corporation), a Delaware corporation. The actions were commenced by the filing in the Court of Chancery for New Castle County of complaints which named as a defendant this appellant, a non-resident of the State of Delaware and a former director of National Theatres & Television, Inc. Thereafter, an order of sequestration was entered by the Court of Chancery, appointing a sequestrator and empowering him to seize "debentures of National Theatres & Television, Inc. standing in the name of each of the aforesaid named defendants, or in or to which they may have or hold any right, title or interest, with all the rights belonging or appertaining to the aforesaid * * * debentures."

The order further provided that:

> "Said * * * debentures and all rights thereunto belonging or appertaining may be sold under an order of this Court to pay the demand of the plaintiff in this cause if the aforesaid named defendants shall not appear or shall otherwise default."

The order of sequestration directed the Register of the Chancery Court to send a copy of the summons, complaint and the order to appellant at his last known address and to have published a copy of the order in a Wilmington newspaper once a week for three successive weeks.

On May 3, 1961 the Sequestrator filed a report with the Court of Chancery in which he stated that he had seques-

tered $421,000. in principal amount of debentures of National Theatres & Television, Inc. registered in the name of appellant. The sequestration was effected by the seizure on the books of the corporation of the debt owed to appellant. The certificates of debenture issued to appellant were not seized physically.

On May 29, 1961 appellant, appearing specially, moved in the Court of Chancery to vacate the sequestration on the ground that the Court lacked power to seize the debt evidenced by the certificates of debenture which appellant asserted were negotiable instruments under the law of the State of New York.[1] The motion was denied in an unreported opinion of the Chancery Court (App. A of Jurisdictional Statement) in which the Court held that under the law of New York the certificates of debenture evidencing the debt were not negotiable instruments and, therefore, the underlying debt was subject to sequestration in Delaware, the domicile of the debtor corporation.

The decision of the Chancery Court was appealed to the Supreme Court of Delaware and was affirmed in a unanimous decision and opinion dated December 13, 1962. On December 27, 1962 the Supreme Court of Delaware issued its Mandate affirming the decision below and thereby returning the cause to the Chancery Court in and for New Castle County.

Argument.

Despite the fact that appellant's Jurisdictional Statement is replete with such terminology as "full faith and credit" and "due process of law under the Fourteenth

1. Appellant and appellees have at all times agreed that by the terms of the indenture agreement under which the debentures were issued the question of whether the certificates of debenture are negotiable instruments is governed by New York law.

Amendment", he has failed utterly to demonstrate that any substantial federal question was raised in the Court below involving either the constitutionality of any state statute, or the failure of the Delaware Courts to give full faith and credit to the laws of the State of New York, or an act of the Delaware Courts depriving appellant of property without due process of law. The sole issue before the Court below was accurately stated by appellant in the Statement of Issues in the reply brief which he filed with the Supreme Court of Delaware, as follows:

> "Thus, only one issue now remains before this Court: Whether registered corporate bonds are negotiable under the laws of the State of New York or, to put it another way, whether they are within the scope of the Hofstadter Act, which is entitled to full faith and credit in the courts of this State."

The Supreme Court of Delaware, agreeing fully with this statement of the issues, rendered a unanimous decision in which it applied New York law and found that under the Hofstadter Act (New York Personal Property Law §§ 260-262) and the decisions of the New York Courts, the debentures in question are non-negotiable and therefore subject to sequestration in Delaware, the state of incorporation of the debtor.

Appellant did not contend below that the statute under which the order of sequestration was issued (10 Delaware Code § 366) offends the Constitution or laws of the United States as applied in this case. *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256 (1920). Moreover, his assertion that the Delaware Courts failed to give full faith and credit to the law of New York, where it is apparent that the Courts below specifically applied the law of New York to the question before them, is without merit.

Further, this appeal is faulty by virtue of the lack of finality in the proceedings below in that the order appealed from does not conclusively dispose of the litigation and contemplates further proceedings in Chancery Court with respect to the debentures in question. Appellant's failure to demonstrate the finality of the order appealed from is in and of itself sufficient ground to dismiss this appeal.

Appellant has not raised a substantial Federal question

As the basis for this appeal appellant contends that the Delaware Courts failed to give full faith and credit to the law of New York. It is apparent that appellant misapprehends the nature and requirements of the full faith and credit clause.

The issue before the Courts below was not whether New York law should be applied, but whether under New York law these debentures were negotiable. This was a question merely of the construction of the law of a sister state and not one of full faith and credit. This Court has repeatedly held that where the Courts of one state recognize that the laws of another state govern a particular issue, full faith and credit has been satisfied and the question of the construction given to that law does not raise a substantial federal question. In *Glenn v. Garth*, 147 U. S. 360, at 368-9 (1893), this Court stated:

> "If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes

> of Virginia. If every time the courts of a State put a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

See, also,

Smithsonian Institution v. *St. John*, 214 U. S. 19 (1909);

Johnson v. *New York Life Insurance Co.*, 187 U. S. 491 (1903);

Banholzer v. *New York Life Insurance Co.*, 178 U. S. 402 (1900).

The Supreme Court of Delaware specifically held that New York law governed this question and after a thorough review of the decisional and statutory law concluded that under the law of New York these registered debentures are non-negotiable. This is not a failure to give full faith and credit to the laws of New York "* * * nor can the contention of counsel, that the * * * [New York] statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States." *Glenn* v. *Garth*, *supra*, at 369-70.

Not a single case cited by appellant as authority for his right to appeal to this Court supports his contention that the Delaware Courts failed to give full faith and credit to the law of New York. With the exception of *Hughes* v. *Fetter*, 341 U. S. 609 (1951), none of the cases

relied upon by appellant involved the application of the full faith and credit clause. Furthermore, *Hughes* v. *Fetter, supra,* although involving a question of full faith and credit, provides no support for appellant since there the Courts of Wisconsin expressly refused to recognize a right granted by the law of another state.

Likewise, appellant's attempt to convert this question into one involving due process of law under the Fourteenth Amendment is equally without merit. Contrary to appellant's contention, the purpose of the Delaware sequestration statute (10 Delaware Code §366), under which the order of sequestration was issued, is to compel appearance by a non-resident defendant who has property within the state, and not, as appellant claims, "to enable the Delaware Court to enter a default judgment and direct the sale of the debentures thus seized." (Jurisdictional Statement, pp. 5-6.) See *Sands* v. *Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A. 2d 365 (1955); *Weinress* v. *Bland*, 31 Del. Ch. 269, 71 A. 2d 59 (1950).

Appellant does not claim that it would be a deprivation of his federal rights for a state to assign under its law the status of non-negotiability to registered corporate debentures. In fact, implicit throughout these proceedings is the concession by appellant that it is proper for and within the discretion of New York to classify, by statute or judicial decision, debentures of the type involved here as non-negotiable. Furthermore, at all stages of the proceedings below appellant has conceded the power of Delaware to seize the debt owed by the corporation if the certificates of debenture are non-negotiable. See *Harris* v. *Balk*, 198 U. S. 215 (1905).

In addition, the Courts below recognized that under the decision of this Court in *Bank of Jasper* v. *First National Bank of Rome*, 258 U. S. 112 (1922), they would lack

power to seize the debt in Delaware if the debentures are negotiable under New York law. Therefore, appellant's assertion of deprivation of property without due process of law is in reality nothing more than a claim that the Courts below were in error in their construction of the law of New York. This does not raise a substantial federal question. Nor does the assertion of deprivation of due process under the circumstances presented call into question the validity of a statute as is required for direct appeal to this Court under §1257(2) of Title 28, United States Code.

Finally, it is submitted that the decision of the Supreme Court of Delaware was so eminently correct as to render frivolous appellant's contentions as they appear at pages 11 through 18 of the Jurisdictional Statement. Appellees can add nothing to the thoroughness with which the Court below considered the question before it and willingly rest their claim that a substantial federal question is not present here upon the opinion below.

However, appellees would be remiss in their duty to the Court if they did not point out a significant omission in appellant's analysis of the provisions of the New York Personal Property Law as contained in his Jurisdictional Statement. At page 12 appellant contends that subdivision 2 of Section 261 of the New York Personal Property Law makes negotiable a "'corporate bond which, by its terms, entitles a person named therein to the benefits thereof * * *'." He totally ignores the remainder of that sentence which reads, "* * *" and which provides; in substance, *that title thereto is transferable with the same effect as in the case of a negotiable instrument*, may be transferred by delivery thereof by any person in possession of the same, howsoever such possession may have

been acquired if endorsed in blank, or if it is endorsed to a specific person and the delivery is made to such person." (Emphasis added.)

It is this latter portion of subdivision 2 of Section 261 which is the touchstone of the inquiry here. Although appellant refers to the debentures as registered bonds, he also chooses to ignore the terms of the debentures (App. C of Jurisdictional Statement) which make them assignable only on the books of the corporation and not by delivery of the certificates themselves. This requirement prevents the debentures in question from being classified as negotiable instruments under the very statute relied upon by appellant.

The order appealed from lacks finality

Despite appellant's characterization of the decision and mandate of the Court below as final, it is readily apparent that the order appealed from lacks the quality of finality required for an appeal to this Court. See *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948). The order below was neither a final judgment nor a final decree. It did not dispose of this litigation, nor did it result in a final determination of appellees' right to the entry of judgment against appellant. Of prime importance, the order appealed from did not establish the right of the sequestrator to sell the debentures in question, nor did it establish appellees' right to receive the proceeds of such sale.

Section 366 of Title 10 of the Delaware Code specifically provides that if a defendant does not appear, or otherwise defaults, the property sequestered "*may* be sold under the order of the Court to pay the demand of the plaintiff * * *." (Emphasis added.) Prior to the entry of judgment and an order of sale, the property is held by the Court.

in custodia legis and title is not vested in the sequestrator, who acts merely as agent of the Court to hold possession of the property under the direction of the Court. *Weinress* v. *Bland*, 31 Del. Ch. 269, 71 A. 2d 59 (1950).

The mandate of the Supreme Court of Delaware, affirming the decision below, contemplates a remand of the action to the Chancery Court for further discretionary action. Only upon appellant's failure to appear in the action[2] and a default judgment having been entered, will the Chancery Court then have to decide whether to enter an order directing a sale of the debentures. This is more than a mere ministerial act. See *Loeber* v. *Schroeder*, 149 U. S. 580 (1893). The order which appellant characterizes as final is merely an interlocutory or intermediate step in this litigation and presupposes further action of a discretionary and final nature. *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U. S. 548, 551 (1945). As such, it lacks finality and is not ripe for review by this Court.

2. Appellant's time to appear in this action has been extended by stipulation until 10 days after this Court enters an order disposing of this appeal.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

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